Supreme Court, U.S.
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No. 01-1244

IN THE
SUPREME COURT OF THE UNITED STATES

JANET GREENWELL,
Petitioner,

v.

AZTAR INDIANA GAMING CORPORATION,
doing business as Aztar Casino,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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REASONS TO DENY THE PETITION

Petitioner tries to grab this Court's attention by distorting both the nature of her claim and the Seventh Circuit's ruling. She argues she sustained an "aggravation" of a pre-existing back condition while at work on Respondent's vessel in June 1997 and sought to hold it liable for negligent surgery that doctors performed in August 1997 "pursuant to" Respondent's maritime duty of maintenance and cure. She further argues the Seventh Circuit's ruling that dismissed her claim was "unprecedented" and based on an erroneous assumption that she had to prove her "aggravation" at work in June 1997 was caused by some fault of Respondent before she could sue it for malpractice of her treating doctors.

In fact, (1) Petitioner's doctors did not treat her pursuant to any cure obligation owed by Respondent; they operated on a pre-existing back problem that she concealed from Respondent when she was hired so no cure duty ever arose, (2) her claim against Respondent relating to her surgery was not based on any allegation that she injured or aggravated her back at work, and (3) the Seventh Circuit did not dismiss her claim for the reasons she states and its holding was in no way novel or unprecedented or in conflict with any decision of this Court or any other circuit.

Petitioner initially did sue Respondent alleging she was injured at work on its vessel in June 1997 but she later dismissed that claim voluntarily. Her remaining claim that was examined by the Seventh Circuit simply alleged that two surgeons injured her in August 1997 by operating on her negligently, and that the surgeons were "selected" by Respondent so it should be vicariously liable for their actions under the Jones Act and general maritime law.

The Seventh Circuit recognized the well-established rule that if a crewmember is injured aboard ship, her employer can be liable for negligent medical care that worsens the injury. However, here the seaman sought to base Jones Act liability on an injury that private physicians supposedly inflicted on her long after she left the vessel, while treating a pre-existing condition that her pleadings did not allege was caused or aggravated by any occurrence aboard the ship. The Court properly held that federal subject matter jurisdiction did not exist in that situation.

The Seventh Circuit's opinion is in complete accord with previous holdings of this Court and other circuits. The case does not present issues of general importance. Review should be denied.

I.

PETITIONER MISSTATES KEY FACTS AND ALLEGATIONS OF HER OWN COMPLAINT

Petitioner had spondylolisthesis (a spine condition) that caused frequent episodes of low back pain sometimes radiating into her leg. She received chiropractic care for 20 years and twice was recommended to have corrective surgery to fuse her L5S1 vertebrae. Her problem was concealed from Respondent when she applied to load bags of coins into machines on its gaming vessel. She experienced one of her frequent ongoing episodes of back pain while walking on the ship in June 1997, worked on land for 2 months, and then underwent the same fusion surgery that had been recommended long before she was hired by Respondent.[1]

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[1] Respondent did not select Petitioner's surgeons as she claims; they were recommended by her primary care doctor. It did not give her any form to sign about choosing doctors; apparently, her primary care physician gave her a form saying employees covered by state workers' compensation must defer to the employer's choice of doctor. This did not apply to vessel crewmembers like Petitioner who had a free choice of providers. Finally, Respondent did not deny Petitioner's request for a second opinion; it specifically told her she had the right to select her surgeons.

Respondent initially paid for Petitioner's surgery based on her report that she experienced back pain while on its vessel. It later learned her surgeons operated on a pre-existing concealed defect and filed a declaratory judgment action asking the district court to rule it was not liable to pay further benefits.[2]

Petitioner countersued Respondent in the district court. Her first complaint consisted of a single count, setting forth a traditional Jones Act claim alleging she was injured on the vessel in June 1997. Later, being unhappy with the result of her August 1997 surgery, she filed suit in state court against her surgeons seeking damages for their alleged malpractice. She then amended her federal complaint against Respondent to add the Count II claim that is the subject of her Petition.[3]

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[2] Respondent did not pay for Petitioner's surgery "pursuant to its cure obligation" as alleged by her. An employer has no obligation to pay for treatment of conditions that are concealed from it as in this case. See p. 9 *infra*. Respondent would not have paid for the surgery if it had known of her concealment earlier.

[3] She also added state claims (Counts III and IV) asserting fraud against Respondent for alleging "forcing" her to see these particular surgeons. The Seventh Circuit did not consider those state claims and they are not a subject of the Petition.

Count II sought to hold Respondent vicariously liable for the alleged malpractice of her surgeons under the Jones Act. Count II was based solely on the allegation that her surgeons were chosen by Respondent and injured her in August 1997 (while she was allegedly still in the ship's service) by operating on her negligently. After adding her Count II claim, Petitioner voluntarily dismissed her original Count I claim alleging she was injured at work in June 1997.[4]

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[4] Petitioner claims her dismissal of Count I "did not disavow" that her surgery was made necessary by an "aggravation or recurrence" of her back condition. (Petition p. 12). However, the only allegations in Count II were that Respondent "selected" her surgeons and while performing surgery in August 1997 they breached the "applicable standard of care," thereby injuring her. Count II contained no allegation that Petitioner sustained any injury or aggravation at work, or that her surgery in August 1997 was made necessary because of any injury or aggravation.

She also says she "did not drop the charge" that she was injured "in the service of the ship." Her pleadings did assert she was "in the service of the ship" but once she dismissed Count I the only claim to which that allegation attached was her Count II claim that she was injured during surgery in August 1997. She was not in the ship's service at that time. See p. 10 below.

The Seventh Circuit held that "had (Petitioner's) back pain been caused by an injury at work, as she originally charged" (in Count I) Respondent would be liable for any malpractice of her treating doctors under "standard" tort theory. 286 F.3d at 489. But her Count II claim sought to base liability only on the injury she alleged in August 1997. To hold Respondent liable for the surgeons' actions under the Jones Act on that count, Petitioner had to show (1) the surgeons were Respondent's "agents" when they injured her in August 1997, and (2) she was still in the "course of employ" as a crewmember at that time.

The Seventh Circuit held that Petitioner's surgeons were not Jones Act agents "acting on behalf of" Respondent when they operated on her pre-existing low back condition in August 1997. The Court also held she was no longer in the course of her employment as a vessel crewmember in August 1997. Thus, the Court held federal subject matter jurisdiction did not exist over the Count II claim. 268 F.3d at 492.[5]

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[5] The ruling had nothing to do with whether or not Respondent was at "fault" for injuring Petitioner on the ship in June, which is the primary basis she asserts for error (Petition p. 10-12). The result was driven by her failure to assert any ship-board injury.

II.

THE COURT BELOW CORRECTLY HELD PETITIONER'S SURGEONS WERE NOT JONES ACT "AGENTS" OF RESPONDENT WHEN THEY OPERATED ON PETITIONER

The Jones Act incorporates the provisions of the FELA which render an employer liable for negligent actions of its officers, employees or "agents." 45 U.S.C. Sec. 51. Land-based doctors selected by the ship to treat conditions not of its making are generally not its Jones Act "agents." Kossick v. United Fruit Co., 336 U.S. 731, 733 (1961) (ship-owner held liable for negligence of a physician it chose to treat an illness based on its promise to the employee in that regard, but with the caveat "liability ... certainly cannot be found on the principles of *respondeat superior*"); Alholm v. American Steamship Company, 144 F.3d 1172, 1180 (8th Cir. 1998) ("a shipowner who is not responsible for the initial injury cannot be held vicariously liable for the negligence of an independent physician").

Non-employees can become "agents" whose negligence can be imputed to the employer under the Jones Act if they are "performing, under contract, operational activities" of the ship. See Hopson v. Texaco, Inc., 383 U.S. 262 (1966).

This Court stated in Hopson that a taxi driver was carrying out an "operational activity" of the ship while transporting two ill crewmen to the U.S. Consul because the ship had a "statutory duty" to take them there before sailing. The ship was held liable under the Jones Act for an injury the driver caused while carrying out the ship's duty.

Presumably, this is the rationale that has prompted some courts to hold that physicians arranged by employers to provide emergency treatment in foreign ports were their Jones Act "agents." See Central Gulf Steamship Corp. v. Sambula, 405 F.2d 291, 302 (5th Cir. 1968); De Centeno v. Gulf Fleet Crews, Inc., 798 F.2d 138 (5th Cir. 1986); Fitzgerald v. A.L. Burbank & Co., 451 F.2d 670, 679-680 (2nd Cir. 1971); Maritime Overseas Corp. v. United States, 433 F.Supp. 419 (N.D.Cal. 1977). Faced with an emergency, the ship has a duty to arrange prompt initial care. De Zon v. American President Lines, 318 U.S. 660 (1943). However, the surgeons that operated on Petitioner in August 1997 were not responding to any emergency aboard the ship. She departed the ship two months earlier and was working in Respondent's office on land.

Furthermore, Petitioner's surgery was for a pre-existing condition not of the ship's making that was concealed from Respondent. It is well-established that an employer has no duty to provide cure for concealed conditions of this kind. Sulentich v. Interlake Steamship Co., 257 F.2d 316, 320 (7th Cir. 1958), cert. den. 358 U.S. 885 (1958); McCorpen v. Central Gulf Steamship Corp., 396 F.2d 547, 548 (5th Cir. 1968), cert. den. 393 U.S. 894 (1968); Evans v. Blidbert Rothchild Co., 382 F.2d 637 (4th Cir. 1967); Wactor v. Spartan Transportation Corp., 27 F.3d 347 (8th Cir. 1994); Burke v. Weyerhaeuser Steamship Co., 350 F.2d 826, 829 n.4 (9th Cir. 1965); Smith v. Apex Towing Co., 949 F.Supp. 667 (N.D. Ill. 1997). Because Respondent had no duty to cure Petitioner's pre-existing concealed condition, her surgeons were not fulfilling any duty Respondent owed her and thus were not acting as its agents when they operated on that condition in August 1997.[6]

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[6] Rannals v. Diamond Jo Casino, 265 F.3d 442 (6th Cir. 2001) cited by Petitioner held that a school might be the agent of the employer while carrying out vessel deck training that the employer paid for and required for advancement. However, that training activity, unlike the activities of Petitioner's surgeons, was clearly in the business interest of the employer.

III.

THE COURT BELOW CORRECTLY HELD PETITIONER WAS NO LONGER IN THE COURSE OF HER EMPLOY AS A VESSEL CREWMEMBER AT THE TIME OF SURGERY

The Jones Act provides a remedy only when a crewmember's injury occurs while "in the course of employment." 46 U.S.C. Sec. 688. Whether a seaman is in the course of employment "depends ... on the nature of the service and its relationship to the operation of the vessel plying in navigable waters." O'Donnell v. Great Lakes Dredge and Dock Co., 318 U.S. 36 (1943).

Nearly any activity aboard ship will be considered in the course of a crewmember's employment, but activity on land will not unless it is in furtherance of the ship's business. Thus, crewmen injured ashore while on personal business are not covered by the Jones Act. See, e.g. Robair v. Penrod Drilling Corp., 720 So.2d 130 (La. App. 1998); Lee v. Miss. River Grain Elevator, 591 So.2d 1371 (La. App. 1991). Here Petitioner was off the ship working in Respondent's office for more than two months when she underwent her surgery in August 1997.

Moreover, her pre-existing condition was not of the ship's making, and she could have elected to have it treated surgically at any time. Her decision to undergo surgery while employed by Respondent, rather than earlier when the same surgery was recommended twice prior to her employment was a personal health matter unrelated to the ship's business. See Tinsley v. American President Lines, 8 Cal Rptr 2d 851, 1992 A.M.C. 2055 (Cal. App. 1992) (crewman who died from cigarette use was engaged in a personal lifetime habit, not business of the ship).

IV.

REVIEW BY THIS COURT IS UNWARRANTED

Subject matter jurisdiction may be raised at any point in a proceeding, including on appeal. It is appropriate for the court of appeals to review the record to the extent necessary to determine whether subject matter jurisdiction exists. Bender v. Williamsport Area School District, 475 U.S. 534, 541 (1986); United States v. Corrick, 298 U.S. 435, 440 (1936). The Seventh Circuit's holding that federal jurisdiction over Count II was absent was amply supported by the record and consistent with this Court's decisions in Kossick, Hopson and O'Donnell. See pp. 7-11 above.

The Seventh Circuit's conclusions, that Petitioner's surgeons were not Respondent's agents and she was no longer in the course of the vessel's employ at the time of surgery, do not even begin to rise to the level of a "generally important issue" that would justify review by this Court. Moreover, Petitioner already has and is pursuing an adequate state remedy against the surgeons she claims injured her. She does not need an overlapping federal remedy against Respondent for the alleged malpractice of those same surgeons, particularly when creation of such a federal remedy would require an untenable expansion of the present body of law governing Jones Act "agency" and scope of employ.

CONCLUSION

Respondent respectfully requests that the Petition be denied.

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